NO. 87-1116

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

EDWIN I. ADUDDELL,

Petitioner

VS.

GAF CORPORATION, ET AL,

Respondents

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

KEVIN J. COOK
GARY D. ELLISTON
DEHAY & BLANCHARD
Plaza of the Americas
2500 South Tower, LB-201
Dallas, TX 75201-2880
214/953-1313

Attorneys for Respondents

LISTING UNDER SUPREME COURT RULE 28.1

Pursuant to Supreme Court Rule 28.1, the following is a list of all parent companies, subsidiaries (except wholly owned subsidiaries) and affiliates of each Respondent:

1. GAF Corporation has no parent, subsidiary or affiliate companies.

2. Armstrong World Industries, Inc. has no parent or subsidiary companies. It has two affiliated companies, ArmStar Venture Assoc. and Forms + Surfaces.

3. Owens-Corning Fiberglas Corporation has no parent or affiliated companies. It has two subsidiaries, Oregon Metallurgical Corporation and O.C. Birdaire.

4. The Celotex Corporation is a subsidiary of Jim Walter Corporation. It has no subsidiary or affiliated companies.

5. Eagle-Picher Industries, Inc. has no parent or affiliated companies. It has one subsidiary, Diehl & Eagle-Picher, Gmbh.

6. Fibreboard Corporation is a subsidiary of Louisiana Pacific Corp. It has no subsidiary or affiliated companies.

7. Keene Corporation is a subsidiary of Bairnco, Inc. It has no subsidiary or affiliated companies.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

NO. 87-1116

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

EDWIN I. ADUDDELL,

Petitioner

VS.

GAF CORPORATION, ET AL.,

Respondents

RESPONDENTS' BRIEF IN OPPOSITION

Respondents, GAF Corporation, Armstrong World Industries, Inc., Owens-Corning Fiberglas Corporation, The Celotex Corporation, Eagle-Picher Industries, Inc., Fibreboard Corporation and Keene Corporation file their Response to Aduddell's Petition for Writ of Certiorari.

ARGUMENT

Petitioner (hereinafter "Aduddell") filed his lawsuit in a state district court in Dallas, Texas, alleging that he suffered from asbestosis as a result of exposure to asbestos containing products manufactured by Respondents. Respondents removed the suit to federal court and asserted limitations as a defense. The district court, after bifurcation, held a bench trial on Respondents' affirmative defense of limitations. The judge found Aduddell's claims were

barred, ruling that Aduddell filed his lawsuit more than two years after he discovered, or should have discovered, that he suffered from asbestosis. Aduddell now asserts in this Court that Rule 11 of the Federal Rules of Civil Procedure prevented him from timely filing suit and should be used to toll the running of the limitations period. Aduddell's arguments are without merit for three reasons:

1. Rule 11 of the Federal Rules of Civil Procedure did not apply to Aduddell's filing of his original complaint in Texas state court;

2. Aduddell failed to raise this issue in the district court; and

3. Rule 11 does not control the issue before this Court.

For each of the above reasons, this Court should deny Aduddell's Petition for Writ of Certiorari.

A. **Rule 11 of the Federal Rules of Civil Procedure did not apply to Aduddell's filing of his original complaint in Texas state court.**

Aduddell filed his suit in the 134th Judicial District Court of Dallas County, Texas, on May 20, 1985. (A–10 of Petition). On June 24, 1985, Respondents removed this action to the United States District Court for the Northern District of Texas and federal jurisdiction was based on diversity of citizenship. (A–10 of Petition). Rule 11 of the Federal Rules of Civil Procedure obviously did not apply to Aduddell's filing of his complaint in state court and Aduddell has no claim that the Rule affected his ability to timely file his cause of action. Additionally, this Court should note that at the time Aduddell filed his complaint in Texas state court, Texas had no Rule 11 equivalent. (*See* Chapter 9 of the Texas Civil Practice & Remedies Code, effective September 2, 1987 and Rule 13 of the Texas Rules of Civil Procedure, effective January 1, 1988). Because Rule 11 of the Federal Rules of Civil Procedure did not apply to the filing of Aduddell's cause of action, Respondents would show that Aduddell's Petition should be denied.

B. **Aduddell failed to raise this issue in the district court.**

Aduddell asserts that he presented his argument to the Fifth Circuit and that Court avoided addressing the Rule 11 issue. In truth, however, Aduddell referred to Rule 11 in only one sentence of the twenty-three pages of briefing he presented to the Fifth Circuit. Aduddell further failed to raise any concerns about Rule 11 before the district court. Respondents would therefore show that Aduddell has waived any alleged error.

Respondents would further show that because Aduddell failed to raise this issue before the district court, there is nothing in the Record in this appeal to show how Rule 11 affected his ability to timely file suit. There is no evidence that Aduddell's counsel had Rule 11 concerns. There is further no evidence of a date, if any, that Aduddell's counsel determined after reasonable inquiry that his client's claim was "well grounded in fact." The Record is void of any evidence which would assist the Court in making a ruling on the relationship of Rule 11 to Aduddell's ability to timely file suit.

C. **Rule 11 does not control the issue before this Court.**

Before a Federal Rule of Civil Procedure is found to prevail over a state law concerning limitations, this Court must determine that the scope of the federal rule is sufficiently broad to control the issue before the Court. *Hanna v. Plumer*, 380 U.S. 460, 85 S.Ct. 1136 (1965). The Court must determine that the rule, properly construed, truly comprehends the disputed issue and is in direct conflict with state law. 19 Wright & Miller, Federal Practice and Procedure, § 4510 at 164 (1982 ed.). On the other hand, if there is no indication that a federal rule was intended to toll a state statute of limitations, there is no need to apply the *Hanna v. Plumer* analysis and the state statute of limitations controls. *Walker v. Armco Steel Corp.*, 446 U.S. 740, 100 S.Ct. 1979 (1980). *See also, Ragan v. Merchants Transfer & Warehouse Co.*, 337 U.S. 530, 69 S.Ct. 1233 (1949).

A clear reading of Rule 11 indicates that there was no intention that it toll a state statute of limitations. While Rule 11 requires inquiry into both the facts and law before a pleading is filed, the level of inquiry is tested against a standard of reasonableness under the circumstances. What constitutes a reasonable inquiry may depend upon several factors, including how much time for investigation was made available to the signer. The Advisory Committee noted:

> "The rule is not intended to chill an attorney's enthusiasm or creativity in pursuing factual or legal theories. The court is expected to avoid using the wisdom of hindsight and should test the signer's conduct by inquiring what was reasonable to believe at the time the pleading, motion or other paper was submitted. Thus, what constitutes a reasonable inquiry may depend on *such factors as how much time for investigation was avilable to the signer*; whether he had to rely on a client for information as to the facts underlying the pleading, motion or other paper; whether the pleading, motion or other paper was based on a plausible view of the law; or whether he depended on forwarding counsel or another member of the bar." (emphasis added)

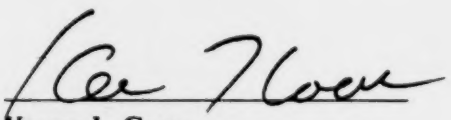
Rule 11 thus contemplates situations in which an attorney, due to an impending deadline established by limitations, has a short period of time in which to file a complaint. The Advisory Committee Notes demonstrate that Rule 11 was not intended to grant an attorney additional time to be added to the period of limitations in which to make an investigation, rather, the amount of time an attorney has in which to make his investigation is but one of the factors to be considered in determining whether an attorney's actions comply with Rule 11. Therefore, Rule 11 and the statute of limitations can exist "side by side . . . each controlling its own intended sphere of coverage without conflict." *Walker v. Armco Steel Corp., supra,* 446 U.S. at 752, 100 S.Ct. at 1986. As a result, Aduddell's assertion that Rule 11 conflicted with his ability to timely file suit is without merit and should be rejected by this Court.

CONCLUSION

This Court should deny Aduddell's Application for Writ of Certiorari. Aduddell is contending before this Court that Rule 11 of the Federal Rules of Civil Procedure conflicts with the statute of limitations applicable to his claim and prevented him from timely filing his cause of action. In reality, however, Rule 11 did not apply to Aduddell's filing of his lawsuit in state court. Aduddell failed to raise this argument before the district court and presented no evidence of how Rule 11 affected his ability to timely file suit. Finally, under the analysis well established by this Court, Rule 11 simply does not conflict with the Texas statute of limitations and there is no showing it was intended to toll a limitations period.

Respectfully submitted,

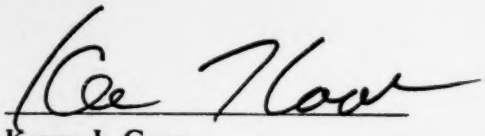
DeHay & Blanchard



Kevin J. Cook
Gary D. Elliston
Plaza of the Americas
2500 South Tower, LB–201
Dallas, TX 75201-2880
214/953-1313

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing instrument has been furnished to Mr. Mark Seigel, 3607 Fairmount St., Dallas, Texas 75219, this 20 day of January, 1988.



KEVIN J. COOK